UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------------------------------X

UNITED STATES OF AMERICA : **08 CR. 231 (JSR)**

- v. - :

Omar Maldonado, :

Defendant. :

---------------------------------X

DEFENDANT OMAR MALDONADO'S MOTIONS *IN LIMINE*

LEONARD F. JOY, ESQ.
Federal Defenders of New York
Attorney for Defendant
OMAR MALDONADO
52 Duane Street - 10th Floor
New York, New York 10007
Tel.: (212) 417-8767

DEIRDRE D. VON DORNUM
Of Counsel

TO: **MICHAEL J. GARCIA, ESQ.**
United States Attorney
Southern District of New York
One. St. Andrew's Plaza
New York, New York 10007
Attn: **NICOLE W. FRIEDLANDER, ESQ.**
Assistant United States Attorney

April 14, 2008

BY HAND DELIVERY

Honorable Jed S. Rakoff
United States District Judge
Southern District of New York
500 Pearl Street, Room 1340
New York, New York 10007

Re: United States v. Omar Maldonado
08 Cr. 231 (JSR)

Dear Judge Rakoff:

The defense respectfully submits the following four motions *in limine*, in advance of the trial, which is scheduled to begin April 28, 2008. The defense asks that: (1) the Government be prohibited from using the phrase "convicted felon" when referring to Mr. Maldonado in the presence of the jury; (2) the Government be prohibited from making any reference to, or introducing any evidence pertaining to, three characteristics of the gun that are not probative of any element the Government must prove at trial, *i.e.*, that it was loaded, that it was operable, and that at some time in the past it had been discharged; (3) there be no reference to the name or nature of Mr. Maldonado's prior conviction and the jury receive a limiting instruction at the time the prior conviction stipulation is entered into evidence; and, (4) should Mr. Maldonado decide to testify, the Government be limited to questioning Mr. Maldonado about the fact of one of his 2006 felony convictions, without reference to the nature of the conviction or its underlying facts, and that all other questioning about his prior convictions be excluded pursuant to Federal Rules of Evidence 609 and 403.

I. THE PHRASE "CONVICTED FELON" SHOULD NOT BE USED TO REFER TO MR. MALDONADO.

The phrase "convicted felon" carries with it a connotation of a bad and dangerous person that could cause the jury to convict Mr. Maldonado based on fear and prejudice rather than on the evidence at trial. Accordingly, the Second Circuit has instructed that avoiding the phrase "convicted felon" is the preferred practice; doing so minimizes the risk of prejudice in a felon in possession case resulting from the jury hearing about the existence of a defendant's prior felony. See United States v. Belk, 346 F.3d 305 (2d Cir. 2003).

Re: United States v. Omar Maldonado
08 Cr. 231 (JSR)

In Belk, the district court "instructed the Government to refrain from characterizing Mr. Belk as a 'convicted felon' in its arguments at trial." Id. at 309. The Second Circuit noted with approval the careful precautions taken by the district court to limit the risk of unfair prejudice from the jury learning of the defendant's status as a convicted felon. Such precautions included a curative jury instruction, redaction of the indictment to omit the nature and number of prior felonies, and instructing the Government to refrain from characterizing the defendant as a "convicted felon." The Court lauded this practice, calling it a "commendable" method for introduction of the evidence of the prior felony conviction. Id. at 311.

Because of the inflammatory nature of the phrase "convicted felon," the defense asks that the Court instruct the Government to refrain from characterizing Mr. Maldonado as a "convicted felon" at any time during the trial.

II. THE GOVERNMENT SHOULD BE PROHIBITED FROM INTRODUCING EVIDENCE THAT THE GUN WAS LOADED, OPERABLE, OR HAD BEEN DISCHARGED PREVIOUSLY.

A. THE GOVERNMENT SHOULD BE PRECLUDED FROM STATING OR INTRODUCING EVIDENCE THAT THE FIREARM AT ISSUE WAS LOADED AND THE INDICTMENT SHOULD BE REDACTED ACCORDINGLY.

Mr. Maldonado respectfully requests that the Court preclude the Government from introducing evidence that the firearm was loaded. Evidence that the firearm was loaded is not probative of any of the elements that the government must prove in its case. With respect to the possession element, the statute requires only knowing possession of a firearm, not knowing possession of a loaded firearm. See 18 U.S.C. § 922(g)(1).

The only purpose of admitting such evidence would be to inflame the passions of the jury. The jury may become improperly focused on the dangers posed by a loaded weapon on a city street rather than on the evidence that relates to the elements at issue in this case. Because the dangers of unfair prejudice outweigh the non-existent probative value of the evidence, the Court should preclude evidence that the firearm was loaded under Fed.R.Evid. 401 and Fed.R.Evid. 403.

If the Court precludes the government from introducing evidence that the firearm was loaded, the "to wit" clause of the indictment should be redacted accordingly. The indictment is not evidence against the defendant, and the jury should not be prejudiced by surplusage in the indictment that does not relate to the relevant evidence in the case. See Fed. R. Evid. 7(d) ("Upon defendant's motion, the court may strike surplusage from the indictment or information.").

B. THE GOVERNMENT SHOULD BE PRECLUDED FROM STATING OR INTRODUCING EVIDENCE THAT THE FIREARM AT ISSUE WAS OPERABLE OR HAD PREVIOUSLY BEEN DISCHARGED.

Mr. Maldonado respectfully moves for a pre-trial ruling precluding the Government from introducing evidence at trial that the gun charged in the indictment was operable or had been previously discharged at some point in time. This evidence should be precluded, pursuant to Federal Rule of Evidence 403, because any limited probative value it may have is substantially outweighed by the risk that its admission would unfairly prejudice Mr. Maldonado.

First, whether or not the gun was working or had been discharged is not probative of any of the elements of the felon in possession charge against Mr. Maldonado. The government must prove three elements at trial: (1) Mr. Maldonado knowingly possessed the firearm; (2) the possession was in or affected interstate commerce; and, (3) Mr. Maldonado had been previously convicted of a crime punishable by imprisonment for a term exceeding one year. See 18 U.S.C. § 922(g)(1). Whether or not the gun was working or had been discharged is not probative of any of these elements. See 18 U.S.C. § 921(a)(3) (defining a "firearm" as "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive"); United States v. Maddix, 96 F.3d 311, 316 (8^{th} Cir. 1996) (firearm need not be operable).

Second, admission of evidence that the gun was operable or had been discharged would unfairly prejudice Mr. Maldonado by improperly and unfairly suggesting to the jury that Mr. Maldonado had fired the gun in the past or was planning to in the future. The jury could be led to convict Mr. Maldonado based on a fear that Mr. Maldonado is dangerous, rather than based on evidence regarding the elements of the crime with which he is charged. See Old Chief v. United States, 519 U.S. 172, 180 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.").

Third, there is no evidence regarding who fired the gun or when it was fired, since it is impossible to date discharge residue. In fact, there is no physical evidence whatsoever linking Mr. Maldonado to the gun, so the implication that Mr. Maldonado had discharged the gun, or might do so in the future, would be not only prejudicial but misleading, and should be excluded for this reason as well. See Fed. R. Ev. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

III. NO REFERENCE SHOULD BE MADE TO THE NAME OR NATURE OF MR. MALDONADO'S PRIOR CONVICTION AND THE JURY SHOULD RECEIVE A LIMITING INSTRUCTION AS TO THE USE OF THE PRIOR CONVICTION

Where, as here, a defendant offers to stipulate that he has a prior qualifying conviction, a district court may not admit evidence of the name and nature of that conviction to prove the prior conviction element of 18 U.S.C. § 922(g)(1). See Old Chief v. United States, 519 U.S. 172 (1997). In Old Chief, the Supreme Court held that such evidence should be excluded under Federal Rule of Evidence 403 because it is unfairly prejudicial to a defendant, given the likelihood that a jury informed of the nature of a prior conviction would be led to convict the defendant of possessing a firearm on an improper basis. See id. at 181, 185. This prejudice outweighs the probative value of the name and nature of the conviction in light of the statutory language, which "shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying offenses." Id.

at 186.

Mr. Maldonado will stipulate that he previously was convicted of a crime punishable by imprisonment for a term exceeding one year. Thus, the Court should exclude evidence of the name and nature of Mr. Maldonado's prior convictions to prove that element of the offense. Id. at 181, 185.

For the same reason, the Court should redact the information regarding Mr. Maldonado's prior conviction from the Indictment. As the Supreme Court stated, "[t]he most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instructions." Id. at 190-91.

In addition, after the stipulation between the parties regarding Mr. Maldonado's prior conviction is read into evidence in the Government's case-in-chief, Mr. Maldonado respectfully requests that the Court provide the jury with the following limiting instruction:

> You have just heard a stipulation between the parties concerning a prior conviction for a crime committed by Mr. Maldonado. I caution you that the conviction is only to be considered by you for the fact that it exists, and for nothing else.
>
> You are not to consider it for any other purpose. You are not to speculate as to what it was for. You may not consider the prior conviction in deciding whether the government has proven beyond a reasonable doubt that Mr. Maldonado was in knowing possession of the gun, a charge which is disputed.

Adapted from Sand, Modern Federal Jury Instructions, Instruction 35-48.

Re: United States v. Omar Maldonado
08 Cr. 231 (JSR)

IV. THE GOVERNMENT'S CROSS-EXAMINATION OF MR. MALDONADO REGARDING HIS CRIMINAL HISTORY SHOULD BE LIMITED TO ELICITING THE EXISTENCE OF ONE PRIOR FELONY CONVICTION.

Pursuant to Federal Rules of Evidence 609 and 403, the defense moves to limit cross examination of Mr. Maldonado if he testifies in his own defense. The defense respectfully requests a ruling in advance of the defense case, so that Mr. Maldonado may be properly advised regarding his decision whether to take the witness stand.

A. BACKGROUND

Mr. Maldonado has three felony convictions, each for the criminal sale of a controlled substance. He pleaded guilty on February 16, 2006, to the criminal sale of a controlled substance in the third degree, a class B felony, and was sentenced on March 10, 2006 to 1 to 3 years in prison. He pleaded guilty on January 17, 2006, to two charges of criminal sale of a controlled substance in the fifth degree, class D felonies, and, on March 10, 2006, was sentenced to a consolidated term of 1 year in prison. Each of these three cases involved the street sale of relatively small amounts of heroin.

In addition, Mr. Maldonado has four misdemeanor convictions. On September 23, 2005, he pleaded guilty to the criminal possession of marijuana in the fifth degree and was sentenced to a $200 fine. On November 17, 2004, he pleaded guilty to making graffiti, and was sentenced to 3 years of probation. On the same date, he pleaded guilty to a general violation of local law (in satisfaction of allegations concerning the possession of marijuana) and received a sentence of time served. On May 27, 2003, he pleaded guilty to criminal mischief: intent to damage property and was sentenced to 45 days in prison.

Finally, Mr. Maldonado has twice pleaded guilty to violations of New York law.[1] On March 2, 2005, he pleaded guilty to the unlawful possession of marijuana and was fined $150. On January 24, 2001, Mr. Maldonado pleaded guilty to Harassment in the second degree and received a conditional discharge.

---

[1]Whether a violation of New York law constitutes a conviction of a "crime" within the meaning of Federal Rule of Evidence 609(a) remains an open question. A violation is not a

B. ARGUMENT

Federal Rule of Evidence 609(a) allows evidence of a defendant's prior conviction to be admitted for the purpose of attacking the defendant's character for truthfulness, if he testifies and (1) the crime was punishable by death or imprisonment in excess of one year and the probative value of admitting the evidence outweighs its prejudicial effect to the accused, or (2) if the elements of the crime required proof or admission of an act of dishonesty or false statement, regardless of the punishment.[2]

None of Mr. Maldonado's convictions required proof of "dishonesty or false statement." Thus, none of Mr. Maldonado's convictions are admissible under Rule 609(a)(2).

Mr. Maldonado's three felony drug sale convictions are susceptible to analysis under the first prong of Rule 609(a), because they were punishable by imprisonment in excess of one year, but can be admitted only if the probative value of admitting them outweighs the prejudicial effect on the accused.

"crime" under New York State law, but, rather, a "petty offense." See Penal Law § 10.00 (6); In re W., 34 A.D.2d 1100 (4th Dept. 1970) (A "crime" is either a misdemeanor or a felony but not a "violation"). The Court need not reach this issue, however, because neither of the violation offenses contain elements of dishonesty or false statement, so as to bring them within the requirements of Rule 609(a)(2).

[2]In 2006, the second prong of Rule 609(a) was amended to limit the admission of evidence of a conviction to cases in which the conviction required the proof of an act of dishonesty or false statement, so as to exclude convictions in which such proof was present but not required for conviction, such as a murder carried out through deceit. See Fed. R. Evid. 609, advisory committee's note to 2006 Amendments.

Re: United States v. Omar Maldonado
08 Cr. 231 (JSR)

> "The rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice - *i.e.*, the danger that convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes. Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the probative value of convictions as impeachment evidence outweighs their prejudicial effect."

Fed. R. Evid. 609, advisory committee's note to 1990 Amendments.

The Government cannot meet its burden of showing that the probative value of admitting Mr. Maldonado's prior convictions for the sale of drugs outweighs the prejudicial effect to Mr. Maldonado.

In performing the balancing test set forth in Rule 609(a)(1), the Court should consider a number of factors, including: whether the crime, by its nature, is probative of a lack of veracity; the date of the conviction and the defendant's subsequent history; the degree of similarity between the past crime and the charged crime; the importance of the defendant's testimony, and the centrality of the credibility issue. See 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 609.05[3][a] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2008).

Looking at all of these factors, on balance, Mr. Maldonado's prior convictions should not be admitted. The first and most important factor is "whether the crime, by its nature, is probative of a lack of veracity." United States v. Estrada, 430 F.3d 606, 617 (2d Cir. 2005) (internal citations omitted). The Circuit has noted that possession of drugs with intent to sell and drug sales are not particularly probative of veracity. Id. at 618; United States v. Hayes, 553 F.2d 824, 828 and n. 8 (2d Cir. 1977). Here, Mr. Maldonado was convicted for hand-to-hand sales of narcotics. Such conduct typically has little bearing on one's character for truthfulness.

The date of the convictions and Mr. Maldonado's subsequent history also weigh against admission. Mr. Maldonado was sentenced on all three prior drug cases less than two years before his arrest in this case, and was released from his sentence only a month prior to his arrest in this case. Because of the closeness in time, the jury might wrongly speculate that the charges are connected, or part of a pattern of conduct by Mr. Maldonado.

The next factor, the similarity or dissimilarity of the prior conviction to the charged crime, also weighs against admission of Mr. Maldonado's prior convictions. Although the dissimilarity between the narcotics convictions and the instant charge ordinarily would favor admission of the prior convictions, in this instance the dissimilarity weighs against admission because of the nature of the prior convictions. Selling heroin is more inflammatory and serious in the eyes of most jurors than the present charge of weapon possession. The nature of the charge in this case, therefore, also favors exclusion of the narcotics convictions.[3]

An additional suggested factor is the "importance of the defendant's testimony." Mr. Maldonado's testimony is crucial to his defense. Mr. Maldonado is one of the only people, other than the government witnesses, who can testify to critical facts in issue. Thus, this factor strongly favors exclusion of the convictions, since the admission of his prior convictions may compel him to refrain from exercising his right to testify at his own trial.

The final suggested factor is the "centrality of the credibility issue." In this case the Government has an independent source of evidence, namely the testimony of police officers who will testify as to how they discovered the firearm.

---

[3]The jury already will be informed, during the Government's case in chief, that Mr. Maldonado has a prior conviction. The fact of the conviction is being offered pursuant to stipulation in light of the Supreme Court's ruling in Old Chief v. United States, 519 U.S. 172 (1997). The same reasons that underlie the Supreme Court's holding in Old Chief also support limitation of the Government's questioning in this case, should Mr. Maldonado testify in his own behalf.

Re: United States v. Omar Maldonado
08 Cr. 231 (JSR)

Therefore, although the credibility of the defendant is always in issue when he testifies, given the weight of the Government's evidence in combination with the other factors to be considered, the convictions should be excluded.

Finally, the jury will not be left with the impression that Mr. Maldonado has never been convicted of any crime.[4] On the contrary, the jury will know from the outset of the trial that Mr. Maldonado previously has been convicted of a felony. Given this knowledge, the jury properly may weigh Mr. Maldonado's credibility in light of that conviction, without the overwhelming prejudice that would result from the jury learning that he previously has been convicted for selling heroin.

Allowing cross examination regarding the fact of one prior conviction, while excluding all other questioning strikes the proper balance of probative value against undue prejudice that is set forth in Rule 609 and 403. The jury is properly informed that Mr. Maldonado has a prior felony, and Mr. Maldonado is protected from the danger of unfair prejudice and improper conviction.

V. CONCLUSION

For all of the above stated reasons, Mr. Maldonado asks the Court to grant each of his four motions *in limine* in their entirety.

Respectfully submitted,

Deirdre D. von Dornum
Assistant Federal Defender
Tel.: (212) 417-8767

cc: Assistant United States Attorney Nicole W. Friedlander, Esq. (via ECF)
Omar Maldonado, MDC Brooklyn, Reg. No. 60825-05(via mail)

---

[4] Of course, the defense could not and will not claim that Mr. Maldonado has *only* one conviction.